

1 JOHN C. BLACK, WSBA #15229  
2 DUNN & BLACK, P.S.  
3 111 N. Post, Ste. 300  
4 Spokane, WA 99201-0907  
5 Telephone: (509) 455-8711  
6 Facsimile: (509) 455-8734  
7 E-mail: [jblack@dunnandblack.com](mailto:jblack@dunnandblack.com)

8 Attorneys for Plaintiff

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WESTERN WASHINGTON

10 UNITED STATES OF AMERICA for )  
11 the use and benefit of ) NO.  
12 PERFORMANCE CONTRACTING, )  
13 INC., a Kansas corporation, ) **COMPLAINT FOR DAMAGES**  
14 )  
15 Plaintiff, )  
16 )  
17 vs. )  
18 )  
19 CLARK CONSTRUCTION GROUP, )  
20 LLC, a Maryland limited liability )  
21 company; TRAVELERS CASUALTY )  
22 AND SURETY COMPANY OF )  
23 AMERICA, a foreign company; )  
24 FIDELITY & DEPOSIT COMPANY )  
25 OF MARYLAND, a foreign company; )  
26 ZURICH AMERICAN INSURANCE )  
COMPANY, a foreign company; and )  
FEDERAL INSURANCE COMPANY )  
a foreign company. )  
Defendants. )

1 Plaintiff United States of America for the use and benefit of Performance  
2 Contracting, Inc. and Performance Contracting, Inc. (hereinafter "PCI"), by and  
3 through their attorneys, Dunn & Black, P.S., submit this Complaint for Damages  
4 against Defendants Clark Construction Group, LLC (hereinafter "Clark"),  
5 Travelers Casualty and Surety Company of America (hereinafter "Travelers"),  
6 Fidelity & Deposit Company of Maryland (hereinafter "Fidelity"), Zurich  
7 American Insurance Company (hereinafter "Zurich") and Federal Insurance  
8 Company (hereinafter "Federal").  
9  
10

#### 11 **PREFATORY NOTE**

12 PCI's contract with Defendant Clark contains a unilateral arbitration  
13 provision which purports to grant Defendant Clark the sole right to require that all  
14 disputes between PCI and Defendant Clark be subject to binding arbitration. At  
15 the time of filing this Complaint, PCI has no knowledge whether or not Defendant  
16 Clark intends to assert such purported right regarding this dispute.  
17

#### 18 **PARTIES, JURISDICTION, VENUE**

19  
20 1. At all times material hereto, Plaintiff PCI is a Kansas corporation in  
21 good standing, with its principal place of business in Lenexa, Kansas, and is  
22 registered as a general contractor with the Washington State Department of Labor  
23 & Industries, license number, PERFOCI159K1. PCI has done all things required  
24 of it to maintain bring the current lawsuit.  
25  
26

1           2.     Upon information and belief Defendant Clark is a Maryland limited  
2 liability company, with its principal place of business in Bethesda, Maryland and is  
3 registered as a general contractor with the Washington State Department of Labor  
4 & Industries, license number CLARKCG963M2.  
5

6           3.     Upon information and belief, Defendant Travelers is a Connecticut  
7 corporation, with its principal place of business in Hartford, Connecticut and is  
8 licensed with the Washington State Office of the Insurance Commissioner, license  
9 number 10.  
10

11           4.     Upon information and belief, Defendant Fidelity is a Maryland  
12 corporation, with its principal place of business in Schaumburg, Illinois and is  
13 licensed with the Washington State Office of the Insurance Commissioner, license  
14 number 442.  
15

16           5.     Upon information and belief, Defendant Zurich is a New York  
17 corporation, with its principal place of business in Schaumburg, Illinois and is  
18 licensed with the Washington State Office of the Insurance Commissioner, license  
19 number 1476.  
20

21           6.     Upon information and belief, Defendant Federal is a New Jersey  
22 corporation, with its principal place of business in Whitehouse Station, New Jersey  
23 and is licensed with the Washington State Office of the Insurance Commissioner,  
24 license number 433.  
25  
26



1 82298628/09156772, guaranteeing the payment of all claims for labor performed  
2 and materials, equipment and supplies furnished to the Project. The Bond Issuers,  
3 as surety, and Clark as principal, each bound themselves, and are jointly and  
4 severally liable on the basis of the payment bond, as reflected therein.  
5

6 13. In March 2015, PCI entered into a written subcontract with Clark to  
7 provide certain labor, services, materials, equipment and supplies to the Project. A  
8 true and correct copy is attached hereto as **Appendix A** (hereinafter “the  
9 Subcontract”).  
10

11 14. PCI’s scope of work included without limitation, cold formed metal  
12 framing, gypsum sheathing, cementitious sheeting, non-structural metal framing,  
13 gypsum board, acoustical ceilings, suspended wood ceilings, sound absorbing wall  
14 units, raised access flooring and other such requirements as described more fully in  
15 **Appendix A**.  
16

17 15. In exchange for such labor, materials and services, PCI was to be paid  
18 the sum amount of six million six hundred ten thousand dollars and 00/100  
19 (\$6,610,000.00), which sum was subject to revision in the event there were  
20 changes in PCI’s work scope.  
21

22 16. The Project suffered a series of delays from the beginning of the  
23 Project. These delays impacted the work progress and led to increased costs to  
24 PCI.  
25  
26

1           17. The Project also suffered from a series of water intrusion issues which  
2 further delayed the Project and which caused Defendant Clark to perform  
3 significant re-work including removal and reinstallation of previously installed  
4 materials and previously completed scope of work.

5  
6           18. Defendant Clark also directed PCI to perform additional work outside  
7 of the contracted scope of work, as well as, acknowledged extra work orders for  
8 PCI's increased expenses and costs due to delays, inefficiencies, design changes,  
9 damage to scope of work by other trades, damaged scope of work due to moisture  
10 mitigation and other such issues experienced during construction of the Project.

11  
12           19. The express terms of the contract state that if PCI's work is changed  
13 at the direction of Clark or the Project owner (the VA), PCI is entitled to an  
14 equitable adjustment to, and increase of, the contract price, as well as payment  
15 from Clark for the same.

16  
17           20. PCI has requested Clark issue equitable adjustment to, and an increase  
18 of, the contract price, as well as payment for such increased contract price, based  
19 upon PCI additional costs incurred due to Clark's directed changes to PCI's scope  
20 of work. To date, Clark has failed to comply with PCI's request.

21  
22           21. PCI completed all of its contractual obligations and last furnished  
23 labor, services, materials, equipment and/or supplies for the Project on or about  
24 June 29, 2018.

1       22. There is now due and owing from Clark to PCI after accounting for all  
2 contractual performance, authorized change orders, credits, and charges for all  
3 changed and additional work, for which PCI has demanded payment.

4       23. Clark and the Bond Issuers have failed to make payment to PCI under  
5 the subcontract. PCI has suffered damages including interest, attorney's fees and  
6 costs in an amount to be proven at trial.  
7

8                               **FIRST CAUSE OF ACTION**  
9                               **(Breach of Contract/Breach of Good Faith and Fair Dealing)**

10       24. PCI incorporates by reference the allegations set forth above, as if set  
11 forth fully herein.  
12

13       25. PCI and Clark entered into a written construction subcontract for  
14 labor, services, materials, equipment and supplies.

15       26. PCI has fully performed all obligations under the subcontract.

16       27. Clark's actions and omissions constitute breaches of the express and  
17 implied obligations under the Subcontract, including but not limited to the implied  
18 covenant of good faith and fair dealing. In addition, Clark has breached its  
19 contractual obligation to make prompt payment to PCI for all labor, services,  
20 materials, equipment and supplies provided.  
21  
22

23       28. As a proximate result of Clark's breach, PCI has incurred damages in  
24 an amount to be proven at trial but not less than \$3,118,774.00, plus interest, costs  
25 and any attorney fees allowed by law or contract.  
26

**SECOND CAUSE OF ACTION**  
**(Unjust Enrichment/Quantum Meruit)**

29. PCI incorporates by reference the allegations set forth above, as if set forth fully herein.

30. In the alternative to the Breach of Contract claim pled above, PCI claims the following cause of action.

31. PCI performed work on the Project that has conferred value on Clark.

32. PCI acted as alleged herein with the expectation of being compensated in an amount equal to the reasonable value of the work it performed.

33. PCI has not acted as a volunteer or intermeddler.

34. To permit Clark to retain the benefit of PCI's work without compensating PCI would result in the unjust enrichment of Clark at PCI's expense, which should not be allowed.

**THIRD CAUSE OF ACTION**  
**(Promissory Estoppel)**

35. PCI incorporated by reference the allegations set forth above, as if set forth fully herein.

36. Defendant Clark made promises and/or representations to PCI, which Clark knew or should have known or expected that PCI would reasonably rely upon to change its position regarding construction of the Project.



1           37. Based upon Clark's promises and/or representations regarding  
2 construction of the Project, PCI justifiably relied upon such promises to provide  
3 labor, services, materials, equipment and/or supplies to the Project.

4           38. Injustice can only be avoided by enforcing Clark's promises and/or  
5 representations.  
6

7           39. As a direct and proximate result of Clark's failure to adhere to their  
8 promises and/or representations regarding construction of the Project, PCI has  
9 suffered damages in an amount to be proven at the time of trial, but not less than  
10 \$3,118,774.00 plus interest, cost and any attorney fees allowed by law or contract.  
11

12                           **FOURTH CAUSE OF ACTION**  
13                           **(Bond Claim)**

14           40. PCI incorporates by reference the allegations set forth above, as if set  
15 forth fully herein.

16           41. Travelers, as surety, issued the Miller Act required bond on the  
17 Project,  
18

19           42. As a subcontractor to Clark on the Project, PCI is an intended third-  
20 party beneficiary protected and/or covered under the Bond Issuers' surety bond  
21 number 053-SB-1061707548-82298628/09156772.  
22

23           43. PCI has fully performed all obligations under the subcontract.

24           44. More than ninety (90) days has expired since the last date on which  
25 labor was performed or materials were furnished by PCI to Clark for the Project.  
26

1       45. PCI has made demand upon the Bond Issuers and Clark for payment  
2 on the Bond and otherwise satisfied all conditions necessary to receive payment  
3 from the Bond Issuers and/or Clark, but none have paid PCI the amounts  
4 demanded.

5  
6       46. PCI's claims as alleged herein are therefore secured by the Bond  
7 Issuer's payment bond.

8       47. Under Travelers' bond, Travelers is liable to PCI for the amount owed  
9 under the Subcontract, which is an amount to be proven at trial, plus prejudgment  
10 interest, costs and any attorney fees as allowed by law and/or contract.  
11

12       WHEREFORE, PCI prays for the following relief:

13       1. For judgment against Clark, Travelers, Fidelity, Zurich, and Federal  
14 jointly and severally, in an amount to be proven at trial;  
15

16       2. That PCI be awarded prejudgment interest;

17       3. That PCI be awarded all attorney fees and costs allowed by law and/or  
18 contract;  
19

20       4. For judgment on and foreclosure against the Bond Issuers' bond no.  
21 053-SB-1061707548-82298628/09156772 in an amount to be proven at trial, plus  
22 interest, attorney fees, and costs; and

23       4. For such other and further relief as the Court deems proper.  
24  
25  
26

1  
2 DATED this 20<sup>th</sup> day of June, 2019.  
3

4 /s/ John C. Black

5 JOHN C. BLACK, WSBA #15229

6 Dunn & Black, PS

7 111 North Post, Ste. 300

8 Spokane, WA 99201

9 Telephone: (509) 455-8711

10 Facsimile: (509) 455-8734

11 [jblack@dunnandblack.com](mailto:jblack@dunnandblack.com)

12 *Attorneys for Plaintiff*  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of June, 2019, I caused to be electronically filed the foregoing Complaint with the Clerk of the Court using the CM/ECF system.

DATED this 20<sup>th</sup> day of June, 2019.

/s/ John C. Black